IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 878 of 2000
With
CRIMINAL APPEAL No. 880 of 2000
With
CRIMINAL APPEAL No. 893 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHAHBUDDIN KASAMALI SAIYED - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR G RAMAKRISHNAN, for all Appellants,(THROUGH JAIL)
MR.P.D.BHATE, ADDL.PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 09-11/10/2007

ORAL COMMON JUDGMENT

When these three appeals were called out for final hearing, Mr.G. Ramakrishnan, learned Advocate, appointed by the High Court Legal Aid Committee for

placing the case of the appellants is absent. This Court has received an application being Criminal Misc. Application No.6869 of 2003 through the Jail preferred by the appellant of Criminal Appeal No.880 of 2000 requesting for expeditious hearing of the appeal, as accused persons are in prison since long.

2. This group of appeals were listed for final hearing on 5th July, 12th July, 26th July, 2007 and thereafter on 7th August, 13th August, 2007 and thereafter on 6th and 19th September, 2007. None of these days, learned Advocate, Mr.G. Ramakrishnan had remained present for conducting the matters.

3. All the three appeals are arising out of the common judgment and order of conviction and sentence recorded by the learned Additional Sessions Judge, Nadiad, in Special Case No.11 of 1999, on 17th July, 2000. The appellants were charged, tried and sentenced for the respective offences as under:

i) For the offence punishable under Section 397 read with Section 114 of the Indian Penal Code, the appellants are ordered to undergo

seven years rigorous imprisonment.

ii) For the offence punishable under Section 376 read with Section 114 of the Indian Penal Code, the appellants are ordered to undergo seven years rigorous imprisonment and to pay a fine of Rs.500/- each and in default thereof to undergo one month simple imprisonment.

iii) For the offence punishable under Section 342 of the Indian Penal Code, appellants are ordered to undergo six months rigorous imprisonment and to pay a fine of Rs.500/- and in default of making payment of fine to undergo six months simple imprisonment.

iv) For the offence punishable under Section 366 of the Indian Penal Code, no separate sentence has been ordered.

v) All the sentences are ordered to be run concurrently and appellants are given the benefit under the provisions of Section 428 of the Code of Criminal Procedure.

3.1 Whereas, the learned trial Judge, at the conclusion of the trial, has acquitted the appellants from the following charges of offence punishable

1) under Section 3 (1) (2) (3) (10) (11) of the Schedule Caste and Schedule Tribe (Prevention of Atrocities) Act, 1989.
2) under Section 25 (c) of the Arms Act.
3) under Section 363 of the Indian Penal Code.

4. While dealing with the appeal on merits and to appreciate the rival side contentions, it would be beneficial to state the basic facts of the prosecution which is reflected in the charge, framed by the learned trial Court vide Exh.5. It is the say of prosecution that on 20th November, 1996 at about 3:00 a.m., while the two victim lady and other witnesses were sleeping in an agricultural field of village Mahij, the accused persons entered in that field, administered threat by making fire from the country made pistols, looted some cash of Rs.1,200/- and ornaments of the prosecution witnesses valued at Rs.11,000/- and thereafter beaten up them and as a result of which the prosecution witnesses sustained injuries. It is further the case of prosecution that accused persons had detained / confined the complainant and other prosecution witnesses in one small room popularly known as “ordi” and after closing the said room the prosecution witnesses were

asked to give silver and gold ornaments put on by them. It is alleged that there were total four accused persons and out of them two accused persons remained outside the room and other two had entered into the room and thereafter the prosecution witnesses were looted. It is further the case of prosecution that on the same date, time and place the accused persons with the connivance of each other abducted the prosecution witness-Bodiben @ Lilaben Baria and Kashiben Baria and thereafter committed rape. It is alleged that accused No.1 committed rape on Bodiben @ Lilaben Baria and accused No.2 committed rape on Kashiben Baria. It is also alleged that the accused persons while doing the aforesaid act of looting, gave foul abuses to the prosecution witnesses of their caste in public place. It is further alleged that the accused persons armed country made pistol in public place without any pass or permit and committed the aforesaid offence and after commission of offence, the present appellants had run away from the spot. The prosecution witnesses came out from the room after breaking up the bottom part of the door, which was made of thin iron sheet. Thus, the accused persons with the connivance of each other armed with lethal weapons, looted the

complainant and prosecution witnesses and committed rape on two prosecution witnesses and thereby committed offence as aforesaid. A detailed complaint was filed and during the investigation the Police found that Prosecution Witness – Bodiben @ Lilaben Baria and Kashiben had been raped by the accused persons. It is the say of prosecution that the Police was not able to trace out the accused persons. However, the accused persons were arrested in connection with another offence and under the transfer warrant they were brought as suspects on 8th November, 1998 and their formal arrest was made and on the same date and the Kheda Police took the custody of the accused persons under the transfer warrant. The test identification parade was conducted and during the said T.I. Parade, both the victim and other prosecution witnesses had identified the accused persons, as persons who were found in committing the offence as mentioned aforesaid. The complainant had also identified all the four accused persons.

5. When the Court was dictating the judgment on merit and had reached upto the above stage, Mr.Ramakrishnan entered into the Court room and

requested the Court to grant a day's time. Request was accepted and the hearing was adjourned to 10th October, 2007. Thereafter, I have heard Mr.G.Ramakrishnan, learned Advocate for the appellants on the later part of the day.

11th October, 2007

6. Before dealing with the submissions made by Mr.Ramkrishnana, it is relevant to note that in the present case no incriminating articles have been found or recovered during the course of investigation, i.e. the muddamal looted from the prosecution witnesses nor the weapon which was allegedly used in commission of offence. However, the Police was able to find out the pellets that had fallen on the earth after using the country made pistol. The said pellets were also sent to F.S.L. for analysis. The clothes of victim - Bodiben @ Lilaben Baria were also seized and were sent to F.S.L. alongwith other articles. After arrest of the accused, the sample of blood, saliva, semen, etc. were taken and sent to F.S.L. So, this part of the evidence was available with the Court for appreciation.

7. Mr.Ramakrishnan, learned Advocate for the appellants has submitted that as such there was no legal convincing evidence on record and the appellants have been held guilty purely on moral grounds. Because the learned trial Judge has observed in the impugned judgment itself that there were some lapses in the arrangement of test identification parade and this procedural lapses goes to the root of the validity of the parade and weightage should be given to evidence so collected and to the deposition of the Executive Magistrate, who had conducted the test identification parade. The arrangement of test identification parade after lapse of about two years had not remained significant especially when the accused persons were arrested in connection with some other offences. It is further submitted that 12 bore gun was allegedly used, which may be a country made pistol. But, in absence of seizure of weapon from the accused, the muddamal pellets collected from the spot of the incident by the Police would become insignificant and irrelevant. The learned trial Judge also ought not to have ignored the fear factor because it is the allegation of the prosecution that fear factor was generated by

the accused persons, and therefore, it was not easy for any of the prosecution witnesses to identify any of the accused especially by faces. Non-seizure of any muddamal weapons or the property allegedly robbed, makes the prosecution case more doubtful. The learned trial Judge also ought not to have ignored one crucial aspect that description given by prosecution witnesses of the accused persons does not indicate any body mark of the accused. The description given by the prosecution witnesses was on the basis of the cloth which they had put on. One of the prosecution witnesses had stated that because of some mark on the face, she was able to identify the accused, who had rapped her on her. However, the learned trial Judge ought not to have believed her evidence.

7.1 It is further submitted that the medical evidence does not support the theory of rape at all. The medical evidence in the form of certificates issued by the doctor falsify the theory of rape, as no spermatozoa was found during the examination of either Bodiben @ Lilaben Baria and Kashiben, though they were examined on the very date between 5:00 and 6:00 p.m. Although, these witnesses are young,

matured and being married, the doctor was not able to indicate any visible evidence, i.e. mark of violence on the body of these two female witnesses. So, in that background and when the laboratory report was not able to opine specifically after serological test of underwear of both these female victim that they were stained with semen of the group of accused Nos.1 and 2, the F.S.L. Report should be considered. However, the finding of F.S.L. Report mentions as indecisive / inconclusive and therefore it would not help either to the accused or to the prosecution. So, in view of such inherent weakness in the case of prosecution, the accused could not have been held guilty. It is submitted that this Court after re-appreciating the evidence, may acquit the respondents-accused from the charges levelled against them.

8. On careful reading of the impugned judgment and order, it emerges that certain procedural lapses are made in arranging the test identification parade, but they are insignificant in nature. There is no evidence that photographs of the accused arrested in connection with some other offences were taken or published. This Court is also of the view that when

the prosecution witnesses including the complainant and witness-Kashiben were not to get anything in the nature of muddamal from the accused, they had no reason to falsely implicate all the four accused persons in such a serious crime. True it is that story of commission of rape was not placed before the Police initially but it is clear from the pattern of evidence led that as Prosecution Witness No.7-Bodiben was taken out of the small room and was found in the early hours of the next day. She had disclosed that after detecting her out of the small room, she was rapped. Prosecution Witness No.6-Kashiben also thereafter appears to have joined though she was sent back within seven to ten minutes, as P.W.No.7 was rapped by accused No.2. According to P.W.No.7-Bodiben, the accused No.2 had attempted to play with her. In such a situation, if the Police was able to trace that one another serious offence also has been committed by the accused then it was obligatory on the part of the Investigating Officer to collect the evidence in that direction. It is not the say of either Kashiben or Bodiben that they were beaten up by weapon like stick, etc. so obviously no such mark of injuries were found on their body. When these two prosecution witnesses were sent to hospital for

medical examination on the day of the incident, it shows that they must have told to the Police that both of them have been rapped by the accused persons. Only on the date of test identification parade, both these witnesses were able to link the accused Nos.1 and 2 specifically with the crime qua the rape committed by the respective accused. This would not make their version doubtful.

9. The learned trial Judge has rightly commented that there was no reason for any of these witnesses to implicate the accused Nos.1 and 2 in the offence of rape. Both these victim lady have categorically stated that accused persons had committed rape on them. Kashi has stated that accused No.2 had committed rap on her and Bodi has stated that accused No.1 had committed rape on her and thereafter accused No.2 had also attempted to play with her, but at that time she was able to escape after making a big shout and she was hidden herself behind the bushes. Both these victim lady had identified the accused Nos.1 and 2 in the test identification parade and there is evidence of complainant, who was able to identify all the four accused persons during the test identification

parade.

10. The F.I.R. (Exh.41) and the evidence of complainant (Exh.40) is found consistent and there are no material improvement and contradiction which can be said to be significant in nature. In the present case, the Police was not able to find any clue qua the accused persons and it is the experience of the society as well as of the Court that Police is able to detect the crime on the strength of the instructions available to them as to the pattern of the commission of crime or the involvement of the accused persons in subsequent crimes committed by them. In the present case, the accused persons were arrested in connection with one another offence qua the property and they were found taking properties situated on the agricultural field and houses erected in the agricultural field. True it is that the day on which the Kheda Police had applied for transfer warrant, the prosecution witnesses may not have even assumed that offenders of the offence committed qua this offence are the persons who were being brought by Kheda Police. But ultimately, that suspicion of Kheda Police came true and the witnesses were able to identify the accused persons. On close reading of

the cross-examination of the Officer, who had arranged the test identification parade, it is not possible to infer that all prosecution witnesses were taken where the accused persons were kept. If the prosecution witnesses were only interested in making their case sharp then they could have involved all the four accused persons in the offence of either rape or indecent assault as there were about twelve young lady. All of them were resting in the open field in the month of November, as they were employed to work as agricultural labourer in that area. It is very likely that all of them might be working in different fields but for their safety purpose these female might be resting together during night hours in one common field. But the facts remain that prosecution witnesses examined had successfully proved the story initially unfolded before the Police in a consistent manner. The crucial question before the learned trial Judge was that prosecution witnesses have attempted to implicate the accused persons falsely only on the direction given by the Police or their version is genuine version. Normally if the victim is not satisfied that Police has not arrested the real culprits, they would not agree with the say of Police. On the contrary they would make

the shout that till date the Police has not successfully caught hold of the accused and no serious attempts were being made. They are also able to allege against the Police that only with a view to resolve the crime and to complete its record has brought totally unknown and strange persons before them. It is rightly submitted by Mr.Bhate that if the Police was interested in implicating any persons as accused then that exercise could have been done much prior and in couple of months from the date of commission of offence.

11. It is also relevant to note that generally a female witness would not dare to say in the open Court that a particular person has committed rape on her and when the version of these two female witnesses are found acceptable then there is no reason for this Court to reject the evidence of the complainant and his presence at the spot is a genuine presence and he had also received injuries on his body. So the complainant is not a planted witness. In a country like India where large number of people are residing either in small villages or in the houses erected at the outskirts of such villages or in their respective field, it is difficult for the

Police to resolve the crime by detecting such crime and to arrest the real culprits. Considering the infrastructural limitations and non-availability of Police force sometime may possible to go into investigation on day to day basis qua each crime. The Police sometime wait for reasonable time to get a clue. So the lapse of time in detecting the crime and on reaching to the real culprits by itself should not be viewed with doubt. In the present case, the learned trial Judge has rightly believed the evidence of complainant and prosecution witnesses – Kashiben and Bodiben.

12. It is not possible for this Court to agree with the submissions made by Mr.G. Ramakrishnan that medical certificate issued by the doctor falsify the theory of rape. Because simultaneously the clothes of both the victims were seized, sealed and were sent for analysis and both the underwear were found with marks of semen mixed with blood. On the date of incident both these witnesses were sleeping at about 3:00 a.m. and since how many days they were working in the field or area, has not come on record. But, after commission of offence, they were in their respective group and in the surveillance of the

Investigating Officer so it was not easy for these two witnesses to create evidence. If these two witnesses had enjoyed sex with their respective life partners, then the presence of semen mixed with blood would not have been found. There may be more than one reasons for such a result. True it is that the persons who had conducted the serological test was not able to ascertain the exact group of semen or blood or the mixture found on these underwear. On the contrary it would support the story of commission of rape that victim was rapped by two different accused persons at two different time and at two different place in the vicinity where the offence of loot was committed. So the story of commission of rape is not found created story because of any afterthought. If, for the sake of argument, the serological report would have shown the group of semen then also it would open for Mr.G. Ramakrishnan to argue that both these female being married women, the Police also ought to have collected the semen from their respective husband because the semen may be of their respective husband. So, the argument advanced by Mr.G. Ramakrishnan sounds with some logic but does not found acceptable keeping the totality and other evidence led by prosecution including the

victims.

13. The absence of mark of violence on the body of these two witnesses also would not help the accused, because the physic of agricultural labourer are normally rough and robust and it was not possible for any of these two victim to shout, as their lives were under threat. The report of chemical examination and evidence of the doctor based on clinical examination should not be given more weightage. The Court also cannot ignore the other possibility that both these victims might have taken bath after the incident. Because, the incident was occurred in the mid night and they were taken to the hospital for examination on the next day evening.

14. The report received through ballistic expert and Panchnama drawn on the scene of offence also support the version of the prosecution witnesses that to generate fear weapons were fired otherwise the Police could not have detected the pellets from the spot. So, non-recovery of muddamal weapon would not destroy the case of prosecution. The presence of pellets and their conditions noticed by ballistic expert clearly corroborates the say of prosecution

witnesses that fire arm was used to generate fear. In number of cases this Court and the Apex Court has ignored the lacuna left by prosecution by not seizing the weapon or failure in searching of the weapon used in commission of crime. If any other evidence is capable to prove the fact that a particular weapon was used then the Court can accept that evidence and in present case this Court can consider the very vital aspect which is available on record in nature of recovery of pellets and the report of examination thereof. So, the learned trial Judge has rightly appreciated all this part of evidence.

15. When it is difficult for this Court to find out any serious infirmity in appreciation of evidence or perversity in the finding recorded by the learned trial Judge then the judgment based on sound, good and logical reasons should require to be upheld. Learned Advocate for the appellants should indicate that the infirmities pointed out by him goes to the root of the case of prosecution and its seriousness is sufficient to approve the acquittal, but in the present case, no such infirmity is found or has been pointed out successfully by learned Advocate for the appellant and therefore the present three appeal

require to be rejected.

16. In aforesaid view of the discussion, all the three appeals filed by the appellants arising out of the common judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Nadiad, in Special Case No.11 of 1999, on 17th July, 2000 is hereby dismissed and finding recorded by the learned trial Judge is upheld. Order and Direction accordingly.

17. The Criminal Misc. Application No.6869 of 2003 is simultaneously also hereby disposed of as having become infructuous on account of dismissal of these group of appeals.

(C.K.BUCH, J.)

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